No. 90-1947

Supreme Court, U.S.
FILED
JAN 2 1992
OF THE CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

JOHN K. YEE and IRENE YEE, *et al.*,
Petitioners,
v.
CITY OF ESCONDIDO,
Respondent.

On Writ of Certiorari to the Fourth Appellate District, Division One, Court of Appeal for the State of California

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BRIEF OF THE INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, NATIONAL LEAGUE OF CITIES, NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS, U.S. CONFERENCE OF MAYORS, NATIONAL ASSOCIATION OF COUNTIES, COUNCIL OF STATE GOVERNMENTS, AND NATIONAL CONFERENCE OF STATE LEGISLATURES AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

1. Whether the City of Escondido's Mobile Home Rent Protection Ordinance violates the Takings Clause.
2. Whether the City of Escondido's Mobile Home Rent Protection Ordinance violates the Due Process Clause.

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INTEREST OF THE *AMICI CURIAE*

Amici are organizations whose members include state, county, and municipal governments and officials throughout the United States. *Amici* and their members have a strong interest in legal issues that affect the powers and responsibilities of state and local governments.

This case presents questions concerning the constitutionality of a municipal mobile home rent control ordinance. At stake is the authority of States and local governments to regulate the economic relations of landlords and tenants and, beyond that, to engage in a wide range of economic regulation pursuant to the police power. *Amici* believe that the court below correctly decided that the Escondido ordinance does not require compensation under the Takings Clause. A contrary holding would be irreconcilable with more than a century of this Court's takings decisions. *Amici* accordingly submit this brief to assist the Court in its resolution of the case.[1]

SUMMARY OF ARGUMENT

1. This Court's takings decisions of the past century establish a clear dichotomy between permanent physical occupation of property and economic regulation. While permanent physical occupation has been held to be a *per se* taking, regulation seldom results in a taking. The distinction between permanent physical occupation and economic regulation is essential to the ability of state and local governments to enact regulatory measures pursuant to the police power.

Obliterating this dichotomy, as Petitioners urge, would substantially impede the efforts of States and local governments to further the public interest through regulation. Petitioners' argument is without merit, however. There is no basis in law or fact for applying the permanent physical occupation doctrine to Escondido's rent control ordinance.

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[1] The parties' letters of consent have been filed with the Clerk pursuant to Rule 37.3 of this Court.

2. The Escondido ordinance does not deprive Petitioners of due process of law. The ordinance survives due process scrutiny because the voters of Escondido rationally could have believed that this rent control law would foster its objective of remedying inequitable market conditions arising from the scarcity of mobile home spaces in Escondido. *See Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 242 (1984). Indeed, the ordinance substantially advances its objective in three ways: 1) it controls rents for mobile home pads; 2) it eases the effects of a recognized shortage of affordable housing; and 3) it protects the value of mobile homes.

ARGUMENT

I. THE TAKINGS ANALYSIS URGED BY PETITIONERS WOULD ERADICATE A FUNDAMENTAL DISTINCTION BETWEEN REGULATION AND PERMANENT PHYSICAL OCCUPATION THAT MUST BE PRESERVED TO ENABLE STATE AND LOCAL GOVERNMENTS TO REGULATE IN AREAS OF LEGITIMATE CONCERN

Fundamental to this Court's jurisprudence under the Takings Clause is a distinction between the economic effect of governmental regulation and takings involving the permanent physical occupation of property. Adhering strictly to this distinction, the Court has held that permanent physical occupation is a *per se* taking. Regulation, on the other hand, is evaluated under a multifactor analysis that allows the government broad leeway to adopt measures that promote the public welfare.

Petitioners' primary argument is that the Escondido ordinance regulating rents in mobile home parks requires compensation because it is a permanent physical occupation of their property. Petitioners' ap-

proach to the takings issue obliterates the essential and long-standing distinction between permanent physical occupation and regulation. The Court has "long considered a physical intrusion by government to be a property restriction of an unusually serious character for purposes of the Takings Clause." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982). Only "when the physical intrusion reaches the extreme form of a permanent physical occupation" has a *per se* taking occurred. *Id.*

The narrowness of the permanent physical occupation doctrine has repeatedly been made clear. Over a century ago in *Pumpelly v. Green Bay & Miss. Canal Co.*, 80 U.S. (13 Wall.) 166, 181 (1872), the Court found that permanent flooding of land constituted a taking where the flooding accomplished an actual, permanent physical occupation of the plaintiff's property "so as to effectually destroy or impair its usefulness." Where the government seized and directed operation of a coal mine during wartime, the Court held that such conduct amounted to a taking that required compensation. *United States v. Pewee Coal Co.*, 341 U.S. 114 (1951). The Court reasoned that because there had been an "actual taking of possession and control," *id.* at 116, the seizure made the mines government facilities "'in as complete a sense as if the Government held full title and ownership.'" *Id.* (quoting *United States v. United Mine Workers*, 330 U.S. 258, 284 (1947)).[2]

[2] In *United States v. Central Eureka Mining Co.*, 357 U.S. 155 (1958), on the other hand, the Court found no taking even though the government had ordered mine owners to cease operations. "The Court concluded that the temporary though severe restriction on *use* of the mines was justified by the exigency of war." *Loretto*, 458 U.S. at 432. In dissent, Justice Harlan noted that "as a practical matter the Order led to consequences no different from those that would have followed the temporary acquisition of physical possession of these mines by the United States." *Central Eureka Mining*, 357 U.S. at 181 (Harlan, J., dissenting). Nevertheless, the Court maintained the fundamental dichotomy between physical occupation and regulation by noting that, in contrast to *Pewee Coal*, "the Government did not occupy, use, or in any manner take physical possession" of the mines or mining equipment. *Id.* at 165-66.

More recently, in *Loretto* the Court summarized and applied the law articulated in earlier cases. It stated that "[w]hen faced with a constitutional challenge to a permanent physical occupation of real property, this Court has invariably found a taking." *Id.* at 427. The Court also made clear the draconian manner in which this doctrine operates. "[A] permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve." *Id.* In contrast to asserted regulatory takings, therefore, the government has no opportunity to justify its action by showing that its diminution of private property interests serves an overriding public need. *See* 2 J. Sackman, *Nichols' Law of Eminent Domain* § 6.05, at 6-36 (rev. 3d ed. 1990).

This Court has emphasized that the permanent physical occupation doctrine "is very narrow." *Loretto*, 458 U.S. at 441. As reiterated in *Loretto*, the prerequisite for application of the doctrine is that "the permanent physical occupation of property forever denies the owner any power to control the use of the property; he not only cannot exclude others, but can make no nonpossessory use of the property." *Id.* at 436; *see also id.* at 435 (permanent physical occupation "chops through the bundle" of private property rights, "taking a slice of every strand"); *Key-*

stone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 517 (1987) (Rehnquist, C.J., dissenting) ("Physical appropriation by the government leaves no doubt that it has in fact deprived the owner of all uses of the land."). The Court has cautioned that permanent physical occupation analysis is not to be extended "beyond the scope to which it legitimately applies." *FCC v. Florida Power Corp.*, 480 U.S. 245, 251 (1987).[3]

Absent a permanent physical occupation, the Court's approach to takings claims is markedly different. Where an interference with property rights "arises from some public program adjusting the benefits and

[3] Indeed, as *Loretto* recognized, not even "every physical *invasion* is a taking." 458 U.S. at 435 n.12. "[A] physical invasion is subject to a balancing process," for example, even though "a permanent physical occupation" is not. *Id.* at 432. "The permanence and absolute exclusivity of a physical occupation distinguish it from temporary limitations on the right to exclude." *Id.* at 435 n.12.

This Court's decision in *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980), "underscores the constitutional distinction between a permanent occupation and temporary physical invasion." *Loretto*, 458 U.S. at 434. In *PruneYard* the Court characterized "the right to exclude others" as "essential" and noted that "there has literally been a 'taking' of that right to the extent that the [state supreme court] has interpreted the State Constitution to entitle its citizens to exercise free expression and petition rights on [private] shopping center property." 447 U.S. at 82. The Court did not find an actual taking, however, even though certain persons "may have 'physically invaded' [the owner's] property." *Id.* at 84. The Court emphasized the owner's acquiescence in the "invasion": the general public had been invited to the shopping center, *id.* at 76, and "the owner had not exhibited an interest in excluding all persons from his property." *Loretto*, 458 U.S. at 434.

burdens of economic life to promote the common good," a balancing of public and private interests is undertaken and a taking is far less likely to be found. *Keystone Bituminous Coal*, 480 U.S. at 488 n.18. As the Court observed in *Andrus v. Allard*, 444 U.S. 51 (1979):

> [G]overnment regulation—by definition—involves the adjustment of rights for the public good. Often this adjustment curtails some potential for the use or economic exploitation of private property. To require compensation in all such circumstances would effectively compel the government to regulate by *purchase*. "Government could hardly go on if to some extent values incident to property could not be diminished without paying for every change in the general law."

Id. at 65 (quoting *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922)).

"[T]his Court has accordingly recognized, in a wide variety of contexts, that government may execute laws or programs that adversely affect recognized economic values." *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978); *see Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 225 (1986). Indeed, regulation may substantially diminish the value of property without taking it. *See, e.g., Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962) (ordinance prohibiting excavation below certain level did not constitute taking of land used for sand and gravel mining); *Village of Euclid v. Ambler Realty Corp.*, 272 U.S. 365 (1926) (zoning regulation resulting in 75 percent reduction in property value not a taking); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (ordinance prohibiting

manufacture of brick did not constitute taking although it reduced value of land to less than one-tenth its prior value).

The Constitution does not mandate compensation for the economic impact of governmental regulation upon private property. In contrast to the Court's *per se* approach to permanent physical occupation, only if "regulation goes too far will it be recognized as a taking." *Pennsylvania Coal Co.*, 260 U.S. at 415. In implementing this flexible standard, the Court has developed a "multifactor inquiry generally applicable to nonpossessory governmental activity." *Loretto*, 458 U.S. at 440.

> The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. So, too, is the character of the governmental action.

Penn Central, 438 U.S. at 124. Even with the development of these "formulas and factors," *Andrus*, 444 U.S. at 65, "[r]esolution of each case . . . ultimately calls as much for the exercise of judgment as for the application of logic." *Id.*

The Court's regulatory taking analysis accommodates the need of state and local governments to adopt regulatory measures to promote the common welfare. *See Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834-35 (1987) ("[A] broad range of governmental purposes and regulations satisfies these [takings clause] requirements."); *Penn Central*, 438 U.S. at 125 (regulatory " 'taking' challenges have . . . been held to be without merit in a wide variety of situations"); *see also Keystone Bituminous Coal*, 480

U.S. at 493 (under regulatory takings analysis, person alleging unconstitutional taking bears "heavy burden"). Using this approach, the Court has declined to impose compensatory obligations in connection with traditional governmental regulatory programs. *See Agins v. City of Tiburon*, 447 U.S. 255 (1980) (zoning laws); *Hadacheck*, *supra* (regulation of a specific industrial activity within a designated area); *Goldblatt*, *supra* (same).

Following this Court's strict delineation of the dichotomy between regulation and permanent physical occupation, the lower courts have repeatedly rejected attempts to characterize economic regulation as permanent physical occupation.[4] As these cases indicate, a wide range of essential government regulation will be jeopardized if the Court does not categorically reject Petitioners' expansive reading of the permanent physical occupation doctrine. *Cf. Loretto*, 458 U.S. at 451 (Blackmun, J., dissenting) ("I do not relish the prospect of distinguishing the inevitable flow of cer-

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[4] *See, e.g., Commercial Builders v. City of Sacramento*, 941 F.2d 872, 875 (9th Cir. 1991) (fee imposed on development project to increase availability of low-income housing not analogous to physical taking of property that automatically requires compensation); *Gilbert v. City of Cambridge*, 923 F.2d 51, 59 (1st Cir.) (ordinance limiting conversion of rent-controlled apartments to condominiums not permanent physical occupation), *cert. denied*, 112 S. Ct. 192 (1991); *Calvert Invs., Inc. v. Louisville & Jefferson County Metro. Sewer Dist.*, 847 F.2d 304, 308-09 (6th Cir. 1988) (sewer district's tapping into private company's sewer main not permanent physical occupation); *Hilton Washington Corp. v. District of Columbia*, 777 F.2d 47, 49 (D.C. Cir. 1985) (ordinance prohibiting hotel from excluding licensed taxi driver from using hotel's taxi stand did not effect permanent physical occupation).

tiorari petitions attempting to shoehorn insubstantial takings claims into today's 'set formula.' ").

In cases like this one, involving the landlord-tenant relationship, the Court has applied a regulatory takings analysis and "has consistently affirmed that States have broad power to regulate . . . without paying compensation for all economic injuries that such regulation entails." *Loretto*, 458 U.S. at 440; *see also Florida Power Corp.*, 480 U.S. at 252 ("[S]tatutes regulating the economic relations of landlords and tenants are not *per se* takings."). Among the governmental measures the Court has upheld are regulations controlling rents. *See, e.g., Bowles v. Willingham*, 321 U.S. 503 (1944); *Block v. Hirsh*, 256 U.S. 135, 155 (1921) (police power allows landlord's property rights to be "cut down, and to that extent taken, without pay"). *See also Pennell v. City of San Jose*, 485 U.S. 1, 12 n.6 (1988); *Fresh Pond Shopping Center, Inc. v. Callahan*, 464 U.S. 875 (1983) (dismissing challenge to rent control ordinance for want of substantial federal question). There is no basis for Petitioners' argument that the Court should depart from this well-settled mode of analysis to treat the Escondido ordinance, a paradigmatic rent control law, as a permanent physical occupation of property.[5]

[5] Petitioners' primary takings argument is founded on their view that *Loretto* expanded the concept of permanent physical occupation to include particular rights generally associated with ownership. *See* Pet. Br. 10. *Loretto* did nothing of the sort. The defendants in *Loretto* had physically occupied—permanently—a small but definite portion of plaintiff's land. *Loretto*, 458 U.S. at 422; *see also id.* at 438 & n.16. *Loretto* merely applied "[t]he historical" or "traditional rule" of permanent physical occupation. *Id.* at 435-36. It held that a "minor but permanent" physical occupation constitutes a taking *per se*, without regard to "minimal economic impact on the owner" or "the volume of space it occupies." *Id.* at 435, 438 n.16.

The Escondido ordinance is simple—it regulates rent increases. Such economic regulation may result in a transfer of money but it has nothing to do with actual, permanent physical occupation. *See United States v. Sperry Corp.*, 110 S.Ct. 387, 395 n.9 (1989) (reversing as "an extravagant extension of *Loretto*" the holding of the court of appeals that "deductions of a percentage of a monetary award" are "physical appropriations of property").

Neither does the California mobile home law, which limits parkowners' discretion to evict homeowners or to refuse to rent to prospective purchasers of mobile homes, effect a permanent physical occupation under *Loretto*. As respondent City of Escondido demonstrates in its brief, the "element of required acquiescence" that is "at the heart" of the physical occupation doctrine is entirely absent from the California statute. *See FCC v. Florida Power Corp.*, 480 U.S. 245, 252 (1987); *Azul Pacifico, Inc. v. City of Los Angeles*, 1991 WL 224528 (9th Cir. Nov. 1, 1991) (Kozinski, J.) (acknowledging constitutionality of California mobile home law); *Eamiello v. Liberty Mobile Home Sales*, 546 A.2d 805, 816-18 (Conn. 1988) (holding that a Connecticut statute similar in effect to the California law "is not sufficiently analogous to a physical occupation of property to violate the takings clause"), *appeal dismissed*, 489 U.S. 1002 (1989).

Standing alone neither the Escondido ordinance nor the California mobile home statute effects an actual, permanent physical occupation. Taken together they

do not do so, either. While their combined effect may be to confer upon incumbent tenants the increased value of mobile homes situated on rent controlled plots, such a transfer of value cannot by any stretch of the applicable doctrine be characterized as a permanent physical occupation. Petitioners, in short, advance precisely the kind of "extravagant extension of *Loretto*" summarily rejected by the Court in *United States v. Sperry, supra.*

II. THE ESCONDIDO ORDINANCE DOES NOT DEPRIVE PETITIONERS OF DUE PROCESS OF LAW BECAUSE ESCONDIDO RATIONALLY COULD HAVE BELIEVED THAT THE ORDINANCE PROMOTES ITS LEGITIMATE OBJECTIVE OF REMEDYING INEQUITIES ARISING FROM THE SCARCITY OF MOBILE HOME SPACES

Petitioners assert that the Escondido ordinance deprives them of their property without due process of law. This argument is patently meritless.[6] The ordinance easily satisfies the requirements of due process because the voters of Escondido rationally could have believed that the rent control ordinance would promote its objective of remedying inequitable market conditions arising from the scarcity of mobile home spaces in the city. Indeed, the ordinance substantially advances that objective by: 1) lowering and stabilizing rents for mobile home pads; 2) ameliorating the effects of an acute shortage of affordable housing; and 3) safeguarding the value of mobile homes.[7]

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[6] A careful reading of Petitioners' brief (at 30-36) indicates that Petitioners have as much as conceded their due process argument.

[7] Respondent City of Escondido demonstrates in its brief that the ordinance not only satisfies the relaxed criteria of

To establish that the Escondido ordinance denies them substantive due process, Petitioners must do more than debate the efficacy of the ordinance:

> Of course, this Act, like any other, may not be successful in achieving its intended goals. But "whether *in fact* the provision will accomplish its objectives is not the question: the [constitutional requirement] is satisfied if . . . the . . . [state] Legislature *rationally could have believed* that the [Act] would promote its objective.

Hawaii Housing Auth. v. Midkiff, 467 U.S. 229, 242 (1984) (quoting *Western & S. Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 671-72 (1981)). "When the legislature's purpose is legitimate and its means are not irrational, . . . empirical debates over the wisdom of . . . socioeconomic legislation . . . are not to be carried out in the federal courts," *id.* at 242-43; as long as the measure's rationality "is at least debatable," its constitutionality is assured. *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464, 470 n.12 (1981) (quoting *United States v. Carolene Prods. Co.*, 304 U.S. 144, 154 (1938)). The Escondido ordinance easily meets this test.[8]

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constitutionality under the due process clause, but also " 'substantially advance[s] legitimate state interests' " without " 'den[ying] an owner economically viable use of his land.' " *Nollan*, 483 U.S. at 834 (quoting *Agins v. City of Tiburon*, 447 U.S. at 260). *Amici* submit that if the ordinance satisfies the heightened scrutiny of *Nollan*, it necessarily satisfies the rational basis scrutiny of substantive due process analysis.

[8] Laws passed by voter initiative are entitled to no less deference than comparable measures enacted by a legislature. *See City of Eastlake v. Forest City Enters.*, 426 U.S. 668, 676-77 (1976).

Petitioners do not "challenge rent controls generally," Pet. Br. 7, and concede that "the courts grant great deference to legislative decisions regarding economic matters in general and rent control in particular," *id.* at 31 (citing *Pennell v. City of San Jose*, 485 U.S. 1 (1988)). Indeed, just three years ago in *Pennell* the Court reaffirmed the States' " 'broad power to regulate housing conditions in general and the landlord-tenant relationship in particular without paying compensation for all economic injuries that such regulation entails' " and "s[aw] no need to reconsider the constitutionality of rent control *per se*." 485 U.S. at 12 n.6 (quoting *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. at 440). *Pennell* summarily rejected a substantive due process challenge to a rent control ordinance. *See id.* at 13-14 & n.8.

Even in an era when freedom of contract frequently stood as an obstacle to economic regulation, *see, e.g., Lochner v. New York*, 198 U.S. 45 (1905), a majority of the Court subscribed to Justice Holmes's opinion that "if, to answer one need, the legislature may limit height, to answer another it may limit rent." *Block v. Hirsh*, 256 U.S. 135, 156 (1921). Foreshadowing present-day due process doctrine, the Court declared:

> Assuming that the end in view otherwise justified the means adopted by Congress, we have no concern, of course, with the question whether those means were the wisest, whether they may not cost more than they come to, or will effect the result desired. It is enough that we are not warranted in saying that legislation that has been resorted to for the same purpose all over the world is futile, or has no reasonable relation to the relief sought.

Id. at 158. The Court has since repeatedly upheld rent control laws. *See Pennell, supra; Woods v. Cloyd W. Miller Co.*, 333 U.S. 138 (1948); *Bowles v. Willingham*, 321 U.S. 503 (1944); *Edgar A. Levy Leasing Co. v. Siegel*, 258 U.S. 242 (1922); *Marcus Brown Holding Co. v. Feldman*, 256 U.S. 170 (1921).

Given six Supreme Court decisions in rent control's favor (as well as the concurrence of "most of the civilized countries of the world," *Block v. Hirsh*, 256 U.S. at 155), Petitioners do not dispute the legitimacy of the interest that the ordinance seeks to advance. Pet. Br. 34. *See Pennell*, 485 U.S. at 12.[9] Petitioners argue, however, that the voters' failure to provide for "vacancy decontrol"—for the negotiation of rents up to market levels at the termination of each tenancy—robs the ordinance of all rationality.[10] Petitioners are in error. The ordinance substantially advances the City's goal of regulating the unique and potentially problematic relationship between the owners of mobile homes and the owners of the land on which those homes sit.

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[9] Appellants in *Pennell* "[did] not dispute that the [San Jose] Ordinance's asserted purpose of 'prevent[ing] excessive and unreasonable rent increases' caused by the 'growing shortage of and increasing demand for housing in the City of San Jose' . . . is a legitimate exercise of [the City's] police powers." 485 U.S. at 12 (citing *Block v. Hirsh*, 256 U.S. at 156).

[10] This feature of the ordinance is not novel. *See Woods v. Cloyd W. Miller Co.*, 333 U.S. at 139 n.1. (declining to invalidate legislation that placed a 15% ceiling on rent increases between tenancies, even though adjustments of 40-60% apparently would have been necessary to bring the rents at issue into line with the prevailing market).

A. Escondido Rationally Could Have Believed That the Ordinance Would Result in Lower and More Stable Rents for Mobile Home Pads

It is beyond dispute that the Escondido ordinance moderates and stabilizes rents for residents whose mobile homes were in place at the time of the ordinance's passage, and that the voters had a legitimate interest in bringing this outcome about. *See, e.g., Pennell*, 485 U.S. at 13. But Petitioners complain that the ordinance "does nothing to ameliorate housing costs for incoming tenants." Pet. Br. 33. This argument recalls Justice McKenna's contention that a rent control ordinance could not conceivably be justified as a means of combatting homelessness, because "[i]f the statute keeps a tenant in, it keeps a tenant out." *Block v. Hirsh*, 256 U.S. at 161 (McKenna, J., dissenting).

Justice McKenna's assertion and Petitioners' challenge to the Escondido ordinance share two fatal flaws. First, the probable effects of regulation are a matter committed to the judgment of the legislature; social policy is ordinarily determined by legislative debate rather than judicial decision. *See, e.g., Hawaii Housing Auth. v. Midkiff*, 467 U.S. at 242; *Block v. Hirsh*, 256 U.S. at 158. As Judge Kozinski recently observed:

> Although it may be true that [vacancy control] in some cases takes money from the landlord and puts it into the pocket of a tenant who no longer resides at the park, the City Council could reasonably believe that in the majority of cases the ordinance serves the valid public purpose of keeping mobile home rent from becoming prohibitively high. How well the ordinance serves this purpose is a legislative question, one the court will not consider.

Sierra Lake Reserve v. City of Rocklin, 938 F.2d 951, 958 (9th Cir. 1991) (citing *Pennell*, 485 U.S. at 13).

Second, even if Petitioners' claim that the ordinance fails to aid incoming tenants were correct—and insofar as rent controls enable all tenants to predict and budget for future obligations with some degree of certainty, it is plainly incorrect—there exists no doctrine of constitutional law that requires the voters of Escondido to "strike at all evils at the same time or in the same way." *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. at 466 (quoting *Semler v. Oregon State Bd. of Dental Examiners*, 294 U.S. 608, 610 (1935)); *see also Woods v. Cloyd W. Miller Co.*, 333 U.S. at 145 (legislature "need not control all rents or none"). If Escondido someday concludes that in practice the ordinance unduly advantages incumbent tenants at the expense of incoming tenants, it may well be appropriate for the City to adjust the ordinance so that its protections are more evenly spread among future generations of tenants. The point is that Escondido is constitutionally permitted to leave such fine-tuning for another day.

B. Escondido Rationally Could Have Believed That the Ordinance Would Ameliorate the Effects of an Acute Shortage of Low-Cost Housing

Petitioners also argue that the Escondido ordinance does nothing to alleviate the scarcity of low-cost housing in that community.[11] The focus of the ordinance

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[11] In *Azul Pacifico, Inc. v. City of Los Angeles*, 1991 WL 224528 (9th Cir. Nov. 1, 1991), the Ninth Circuit appeared to advocate migration from high-rent areas of California to

on the *effects* of scarcity, however, is entirely valid. As the Court noted in *Pennell*, "the Government may intervene in the marketplace to regulate rates or prices that are artificially inflated as a result of the existence of a monopoly or near monopoly, or a discrepancy between supply and demand in the market for a certain product." 485 U.S. at 11-12 (citations omitted); *see also Woods v. Cloyd W. Miller Co.*, 333 U.S. at 143 (legislature may legitimately aim to "control the forces that a short supply of the needed article created").

Moreover, as Petitioners acknowledge, the problem of housing scarcity has recently been addressed by a California statute that exempts new mobile home parks from rent control. *See* Pet. Br. 27 n.10 (citing Cal. Civ. Code §§ 798.7, 798.45 (West 1991)). Coupling rent control with such incentives for the creation of additional housing is well within the realm of rational legislative choice. *See Edgar A. Levy Leasing Co.*, 258 U.S. at 243-46 (law permitting continued tenancy at judicially set rents and affording tax breaks for new construction was rational response to

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low-rent areas when it took judicial notice of the millions of dwelling places in the state and proclaimed that "[i]f the price of housing in Los Angeles is high, this is simply the free market's mechanism for ensuring efficient allocation of existing housing resources." *Id.* at *34. An essential premise of the police power, however, is that the laws of economics are not the laws of the land. *See Ferguson v. Skrupa*, 372 U.S. 726, 732 (1963) ("Whether the legislature takes for its textbook Adam Smith, Herbert Spencer, Lord Keynes, or some other is no concern of ours."); *Lochner*, 198 U.S. at 75 (Holmes, J., dissenting) ("[A] Constitution is not intended to embody a particular economic theory. . . . "). Cities are not constitutionally required to stand by while market forces drive all but the richest residents out of town.

housing shortage); *Marcus Brown Holding Co.*, 256 U.S. at 198-99 (law exempting "buildings now in course of erection" from moratorium on eviction of tenants was "too obviously justified to need explanation").

C. Escondido Rationally Could Have Believed That the Ordinance Would Protect Mobile Home Owners By Safeguarding the Value of Their Homes

Finally, Petitioners allege that the ordinance permits incumbent tenants to sell their mobile homes at a premium that Petitioners themselves would otherwise pocket. If this is indeed the effect of the ordinance, it is fully justified by the unique potential for exploitation inherent in the relationship between the owner of a mobile home and the owner of the land to which the mobile home is anchored.

"[M]obile homes themselves really aren't: Moving a coach is a substantial and expensive undertaking." *Azul Pacifico*, 1991 WL 224528 at *23.[12] Tenants of mobile home parks own virtually permanent structures that rest on land belonging to someone else.

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[12] *See also Azul Pacifico, Inc. v. City of Los Angeles*, 740 F. Supp. 772, 774 n.1 (C.D. Cal. 1990) (noting that only 3% of California coaches have been moved from the site of their first installation), *aff'd in relevant part*, 1991 WL 224528 (9th Cir. Nov. 1, 1991); *Casella v. City of Morgan Hill*, 280 Cal. Rptr. 876, 877 n.1 (Cal. App. 1991) (reciting city council's findings that "[r]emoval and or relocation of a mobile home from a park space . . . can only be accomplished at substantial cost, and in many instances may cause extensive damage to the mobile home and loss of appurtenances such as integrated landscaping and supporting structures inconsistent with the new location"), *review denied*, 1991 Cal. LEXIS 3294 (Cal. July 17, 1991), *petition for cert. filed*, 60 U.S.L.W. 3322 (U.S. Oct. 15, 1991) (No. 91-631).

This situation, as the Court has previously recognized, has many "evils associated with it [and thus] is a classic [candidate for] exercise of a State's police powers," *Hawaii Housing Auth. v. Midkiff*, 467 U.S. at 242; in the absence of regulation, owners of mobile home parks enjoy "an economically dominant position" with respect to their tenants, *see Eamiello v. Liberty Mobile Home Sales*, 546 A.2d 805, 818-19 (1988), *appeal dismissed*, 489 U.S. 1002 (1989).[13]

The price of a used mobile home depends heavily on the rents charged for the pad that it occupies. *See, e.g., Azul Pacifico*, 740 F. Supp. at 776. In *Azul Pacifico*, the Ninth Circuit held that a vacancy control provision in an ordinance similar to Escondido's not only was rationally related to a legitimate state interest, but indeed substantially promoted that interest, because otherwise park owners would set rents for prospective tenants so high that no one would buy the incumbent tenants' coaches. *See* 1991 WL 224528 at *37 (citing *Nollan*, 483 U.S. at 837).

Petitioners deem this scenario implausible because, they contend, no rational park owner would forgo the opportunity to acquire new tenants at decontrolled rents. *See* Pet. Br. 29, 33. Escondido rationally could have considered it likely, however, that absent restraint, park owners will raise rents, perhaps not so high as to scare new tenants away, but high enough to prevent new tenants from making fair offers on the mobile home coaches. In other words,

[13] In *Midkiff* a "land oligopoly" was found by the Legislature to have "forced thousands of individual homeowners to lease, rather than buy, the land underneath their homes." 467 U.S. at 242.

park owners not constrained by vacancy control have the power to appropriate, through inflated rental rates, a substantial portion of the value of departing tenants' homes. Park owners can exercise this power whenever an incumbent tenant is compelled by normal familial and economic pressures to leave the park,[14] and as long as the value of the mobile home that the park owner seeks to capture is less than the cost of uprooting the home and moving it out of the park. Given that "[t]he cost of moving a mobile home can range from three to ten thousand dollars," and that the intrinsic value of the home is often less than that sum, *Azul Pacifico*, 740 F. Supp. at 774, 779, Escondido voters could rationally conclude that action had to be taken "to protect the substantial investments of tenants," *id.* at 780. The ordinance substantially advances this objective by divesting park owners of unfettered discretion to set rents for incoming tenants.

While the ordinance may thereby result in a transfer of wealth from park owners to tenants, the voters of Escondido could constitutionally choose to protect and enhance one form of property ownership at the expense of another. "Indeed, a primary purpose of rent control is the protection of tenants." *Pennell*, 485 U.S. at 13; *cf. Block v. Hirsh*, 256 U.S. at 157 ("The preference given to the tenant in possession is an almost necessary incident of the policy, and is traditional in English law."). "When excessive rents are forbidden, . . . tenants as a class (or at least

[14] *See Hall v. City of Santa Barbara*, 833 F.2d 1270, 1279 (9th Cir. 1986) (tenants are not "immune to the normal familial and economic pressures that occasion vacancies even in rent controlled housing"), *cert. denied*, 485 U.S. 940 (1988).

incumbent tenants as a class) become richer." *Pennell*, 485 U.S. at 22 (Scalia, J., dissenting in part).

The Court analyzed a similar situation more than 60 years ago and resoundingly rejected the constitutional objections:

> [T]he state was under the necessity of making a choice between the preservation of one class of property and that of another . . . . It would have been none the less a choice if, instead of enacting the present statute, the state [had done nothing]. When forced to such a choice the state does not exceed its constitutional powers by deciding upon the destruction of one class of property in order to save another which, in the judgment of the legislature, is of greater value to the public. . . . And where the public interest is involved preferment of that interest over the property interest of the individual, to the extent even of its destruction, is one of the distinguishing characteristics of every exercise of the police power which affects property.

Miller v. Schoene, 276 U.S. 272, 279-80 (1928). "In choosing the tenant rather than the mobile home park operator as the recipient of th[e] economic advantage arising from the near-monopoly status of the industry", the Escondido ordinance, "by allocating its benefit to those who generally are more in need, has not violated any constitutional principle." *Famiello v. Liberty Mobile Home Sales*, 546 A.2d at 820.

CONCLUSION

The judgment of the California Court of Appeal should be affirmed.

Respectfully submitted,

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January 1992